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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 606

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

MICHIGAN CONSOLIDATED GAS COMPAY, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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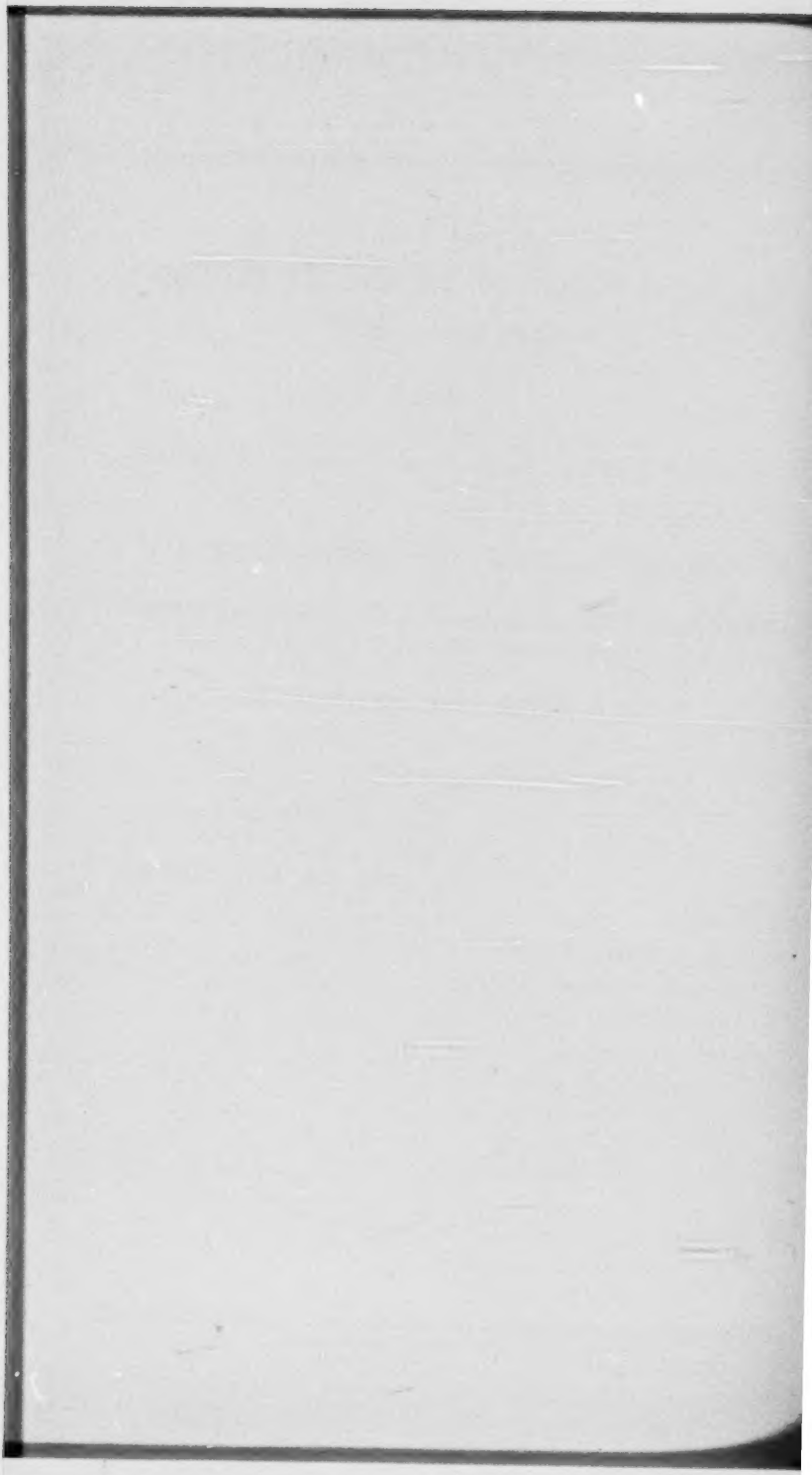

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REPLY BRIEF FOR PETITIONER

FIRST CASE

Respondent's (Consolidated's) response to the first case presented by the petition for certiorari simply ignores certain material facts. The argument is that: (a) the provision of the rate schedule filed by petitioner (Panhandle) and accepted by the Federal Power Commission "prevented" or "prohibited" Consolidated's sale of firm gas to new customers in amounts

in excess of 1,200,000 therms annually; (b) accordingly, that provision in the rate schedule affected "terms and conditions of service"; (c) the Commission excluded "terms and conditions" from its order of November 2, 1945, adopting Panhandle's new rate schedules; (d) therefore, the court below merely interpreted the Commission's order as not approving or accepting the 1,200,000 therm provision because that was excluded from consideration by the Commission; and (e) accordingly, the decision of the court below did not constitute a collateral attack upon the Commission's order.

(a) *Rate Schedule Approved by the Commission Did Not Involve Contract Volumes.* It would be impractical here to cull from the Brief in Opposition (Br.) all of the misconceptions or misstatements it contains regarding the effect of the rate schedule approved by the Commission in its order of November 2, 1945. The rate schedule is described (Br. 4) as introducing two new elements: (1) the base load method of fixing rates; and (2) "a condition designed to effectually prohibit resale of firm gas by the purchasing utility to new customers of the utility using gas in excess of 1,200,000 therms annually."[1]

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[1] It is inferred (Br. 5) that Panhandle included in a prior proposed rate schedule a provision which "would have prevented a utility from purchasing any firm gas for resale to new large industrial customers" but that provision was amended in such a way as to not, in terms, impose such a prohibition. The record on file with the Clerk (Defendant's Exhibit No. 8, not printed) disposes of that inference. The first schedule submitted by Panhandle, which is contained in that exhibit, is not, insofar as is material here, different in any way from the schedule actually approved by the Commission.

Without any support in the Record, respondent asserts that prior to 1942, Panhandle's rates seriously limited resales by utilities for industrial uses and that after its rates were ordered reduced and such sales became feasible, Panhandle desired to prevent its utility customers from taking on new industrial customers since Panhandle had by then initiated a program of making direct sales to industries. For that reason, it is asserted that Panhandle included the 1,200,000 therm provision of the rate schedule. From that, it concludes (Br. 6) that its unquestioned contract right to sell 125,000,000 cubic feet of gas per day to such customers and under such circumstances as it chose was destroyed.

There is simply no warrant for these statements. Panhandle's rate schedule did not impinge upon the contractual right of respondent to take 125 million cubic feet per day from Panhandle. The rate schedule did no more than (1) impose a limitation upon the use to which the gas included in the base load could be put if the base load rate of 1.85 cents per therm was to apply, and (2) provide a means for limiting the base load so that when gas was taken on a firm basis in order to serve a new industrial customer more than 1,200,000 therms per year, the rate would be 2.6 cents per therm. Respondent cannot point to any provision of the rate schedule or any part of the record which would support the assertion that its contractual right, insofar as the quantity of gas it could take on a firm basis, was limited.

The fact is, as forcibly brought out by Consolidated's reference (Br. 12, N. 7) to what transpired at the Commission hearings preceding the November 2, 1945, order, that the rate schedule in no way affected or

limited the previously existing contract volumes. Panhandle's over-all rate level was reduced through the medium of classifying the new rates to be charged according to the use to which the gas sold was to be put (Pet. 24). Consolidated apparently wanted the benefit of a rate reduction, but without the Commission-approved rate structure which was a concomitant part of the rate reduction.

There is no warrant for the assertion that the hearings did not relate to anything but the dollar amount of the rates and that Consolidated was misled. It is clear from the record in this case that Consolidated was not misled and that the 1,200,000 therm provision was specifically taken up during the hearings. See Pet. 10 *et seq.*, R. 1086 *et seq.*, 930a-936a, 938a-945a, 1204a *et seq.*, 1205a N. 2.

(b) *New Rate Schedule Did Not Involve Terms and Conditions of Service.* Since Panhandle's rate schedule did not affect Consolidated's contractual right to take 125 million cubic feet of gas per day from Panhandle, then in fact the rate schedule and, consequently, the Commission's order of November 2, 1945, did not affect "terms and conditions" of service. The only thing the new rate schedule did was to require the payment of a higher price for gas taken contrary to the 1,200,000 therm provision of the rate schedule.

It is quite clear from the Record that the Commission did not consider the therm provision as a term or condition of service. It was simply a part of the rate structure and approved as such.

(c) *Court Below Did Not Merely Construe Order of November 2, 1945.* Consolidated, assuming that the

1,200,000 therm provision[2] limited its contract right to 125 million cubic feet per year, seeks to show that the hearings concerning Panhandle's new rate schedules excluded the therm provision and that the Commission did not purport to approve it. This is patently wrong, for the Commission itself (R. 1030a) clearly said that the provision was in effect and applicable.

Assuming for the moment, purely *arguendo,* that the provision (a) did involve "terms and conditions" of service and (b) was not expressly approved by the Commission, it still does not follow that the court below was correct in condoning avoidance of the rate schedule provisions. Consolidated's argument is self-defeating, for the Commission did not disapprove of that provision and in fact accepted the new rate schedule as drafted. The rate schedule "accepted" by the Commission is binding on buyer and seller alike "and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Commission,* 341 U.S. 246, 251-2.

Consolidated indulges in the assumption that the court below merely construed the Commission's order of November 2, 1945, and, because the Commission had reserved the question of terms and conditions of service, held that the Commission's order did not purport to adopt the 1,200,000 therm provision. This is completely unsupportable. The Court of Appeals for the Sixth Circuit clearly held that the 1,200,000 therm provision

> "*has no legal effect.* The Commission did not take the *required statutory steps* to put the terms and

[2] A therm is a unit of measurement of gas roughly equivalent to 100 cubic feet.

> conditions of service established . . . into effect so as to supersede the contractual provisions." (App. to Pet. 8a) (Emphasis supplied)

The whole import of the Court of Appeals decision was that the Commission failed to make the *necessary findings* to support that provision and accordingly that the *adoption* of that provision was not proper.

Panhandle argued that sufficient findings had been made. The court rejected this contention and said (App. to Pet. 12a):

> "* * * the decisive point is that . . . Gd-1 APPLICABLE (c) [the therm provision] *had no legal effect* . . . .* * * As Panhandle's obligation to deliver limited amounts of gas for resale under the new schedules *was not based upon the essential statutory findings, the order was not effective to supersede the contractual obligations* of the amended agreement of 1935 . . . ." (Emphasis supplied)

There is no suggestion in the opinion of the court below that it was merely construing the order. For alleged lack of essential "statutory findings," it expressly held the order *invalid* insofar as it adopted the 1,200,000 therm provision.

The decision, therefore, is a collateral attack upon the Commission's order. Contrary to Consolidated's assertions (Br. 11), the issue before this Court is not,

> "a narrow and, in the main, factual question, namely, whether the Commission's order of November 2, 1945, approving Panhandle's proposed rates also constituted approval of its proposed condition prohibiting sales to new industrial customers."

It is clear that the Commission did adopt the therm condition as a part of the rate structure and that the court below held, not that the Commission did not adopt it, but that it adopted it in an illegal fashion without the necessary findings.

Consolidated does not meet the question whether the Commission's action in this case was proper in view of this Court's decision in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, (Pet. 18 *et seq.*). It is submitted that this question cannot be belittled by simply misconceiving or misstating the decision below. That the issue is important is manifest, for this Court now has pending four similar cases (Pet. 21) involving related issues. In short, the decision below is a collateral attack upon a Federal Power Commission order; and, aside from that, it presents a novel question as to the requirements imposed upon the Federal Power Commission by Section 5(a), Natural Gas Act.

(d) *Mobile and Sierra Cases.* On February 27, 1956, this Court handed down its decisions in No. 17, 31, 51, and 53, October Term 1955, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation and Federal Power Commission, etc.; Federal Power Commission* v. *Sierra Pacific Power Company, etc.* The importance of the questions presented in this case is further emphasized by this Court's decision in the above-mentioned cases. Those cases, as has been pointed out (Pet. 21 *et seq.*), involved unilateral filings by the natural gas company of *rate increases.* This case involves filing by Panhandle *pursuant to an order of the Commission decreasing its rates.* This, as was pointed out (Pet. 22), was the second step in the rate-making procedure under Section 5, Natural Gas Act;

and it is Panhandle's contention that necessary findings had already been made when the Commission adopted the new schedules.

Even assuming that the necessary findings were *not* made regarding each contract affected by the Commission's order approving the new rate schedules, the result under the most recent decisions might well be that the *higher* rates contained in the contracts superseded by those rate schedules have never been validly abrogated by the Commission. The Commission's original order decreasing Panhandle's rates simply found that the rate level collected by Panhandle was excessive and ordered a reduction in the total rates collected by a specified amount. *The City of Detroit* v. *Panhandle Eastern Pipe Line Company*, 3 F.P.C 273, 292 *et seq.* In that order there was no reference to any specific contract.

The question in this case is whether in a Section 5 proceeding the Commission must, when setting a rate level for a whole pipe line operation as opposed to the individual contract situation involved in the *Mobile* and *Sierra* cases, give specific attention to every single provision of every single contract between the gas company and its customers. As was pointed out in the Petition (Pet. 18 *et seq.*), the Commission had lowered Panhandle's rate level and had under consideration a rate schedule which would achieve the new level adopted in a fashion calculated to eliminate discriminations and unfairness from its details. We repeat, this is not a case involving unilateral change by the natural gas company but a change ordered over the objection of the natural gas company. The question comes down to the extent to which the Commission must refer and make findings regarding each contract

between that natural gas company and its many customers. The Court in the *Mobile* decision (page reference not yet available, 24 LW 4093) pointed out

> " * * * On the other hand, denying to natural gas companies the power *unilaterally* to change their contracts in no way impairs the regulatory powers of the Commission, *for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.* The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other." (Emphasis supplied.)

SECOND CASE

Consolidated has apparently sought to obscure the issues in this case. No attempt will be made to correct each misstatement of fact, as the record speaks for itself. It is clear, however, that Panhandle was not callous to the demands upon its system in undertaking the sale to Michigan Gas Storage (Br. 18-19, 23). Rather, the record shows that Consolidated had never taken its full contract volumes; and, as a consequence, Panhandle's full capacity was not being used (Pet. 27).

It is erroneously asserted (Br. 21, 23) that "Panhandle reduced the volume of its deliveries through Edgerton below the actual capacity of the station." No record citation supports this statement; and indeed it is contrary to the facts. Considerable point was made in the Petition (Pet. 41 *et seq.*) of the complicated factors involved in a determination of compressor station capacity. And even Consolidated admits (Br. 20) that because estimates of compressor station capa-

city frequently do not materialize, the Commission did not determine the capacity in this case.

By glossing over the facts, it is asserted (Br. 28) that the question of the capacity of Edgerton station is not a complicated technical question within the primary jurisdiction of the Commission—that it "reduces itself to mathematical calculations." This assertion must be challenged for it is obviously in error (Pet. 41 *et seq.*). Why would the Commission refuse to make the determination if only mathematical calculations were involved? The determination of compressor station capacity *for any period of time,* past, present, or future, involves technical and policy questions which a court cannot properly determine.

Panhandle is accused of inconsistency regarding the primary jurisdiction question (Br. 28-9). Such is not the case. Clearly, there is a difference between the "jurisdiction" of a District Court and its power to grant relief. *Montana-Dakota Utilities Co.* case, *supra.* As pointed out in the Petition (Pet. 47, N. 34), the basis for Panhandle's objection to reference to the Commission was that the request was made too late and for purposes of delay (R. 437a). Consolidated's motion[3] was filed at the pre-trial of the case, *three years* after the District Court had granted summary judgment as to its original claim on the ground that

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[3] The record shows the reservations with which Consolidated's motion was made (R. 434a). It sought reference without acceding to the Federal Power Commission's jurisdiction. Counsel stated at that time (R. 435a):

> "We make this request not because we believe these issues are not within the jurisdiction of this court . . . we make this petition only because the court has ruled that those issues are . . . within the jurisdiction exclusively of the Federal Power Commission."

the Federal Power Commission had primary jurisdiction.

As pointed out in the Petition, the decision of the court below placed this case in a completely different posture inasmuch as it had been held in prior litigation between the parties and for a number of years in the instant case that Consolidated's claim was within the primary jurisdiction of the Commission.

Panhandle's *res judicata* argument is (Pet. 37) predicated upon and a part of the larger primary jurisdiction argument. The *res judicata* argument further demonstrates the correctness of the primary jurisdiction argument. Whether, as Consolidated puts it (Br. 18) Panhandle may raise the "defense" of *res judicata* in this Court, is not the question. Certainly this Court may notice plain error. Rule 40(d)(2); *United Brotherhood* v. *United States*, 330 U.S. 395, 411-12 and cases cited; *Terminiello* v. *Chicago*, 337 U.S. 1. This is particularly so where the question is presented in the Petition. In any event, it is difficult to believe that the court below was entitled, as between the same parties and with respect to the same underlying issue, to reach diametrically opposed conclusions.

CONCLUSION

The decision of the court below, as was demonstrated in the Petition, presents a number of important problems under the Natural Gas Act. It is submitted that by any objective standard, Consolidated has failed to answer the arguments presented in the Petition. The decision of the court below conflicts in many respects with decisions of this Court and the Courts of Appeal

of other circuits, and the questions presented by the Petition are questions which should be decided by this Court.

Respectfully submitted,

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